MENTAL DEFICIENCY AND THE ENGLISH LAW OF CONTRACT

In order that investigation may be made in a logical and scientific manner to determine whether a person *non compos mentis* may or may not be capable in the eye of the law of entering into a contract, it has been deemed convenient, as a necessary preliminary, to set out shortly certain of the leading principles of the English law of contract.

In innumerable legal decisions and in the works of the great text-writers it has been asserted that the general theory of English law in regard to acts done and contracts made by parties which affect their rights and interests is that in all cases there must be a free and full consent in order to bind the parties. The existence of a free and full consent is insisted upon: moreover, the consent must be an act of reason accompanied by due deliberation, the mind weighing, as in a balance, the good and evil on each side.[1] It has been observed by a celebrated jurist[2] that every true consent implies three things—first, a physical power; secondly, a moral power; and thirdly, a serious and free use of both powers. In dealing with perfect obligations Grotius says: "*Quod autem fit animo non deliberato id nos quoque ad vim obligandi non credimus pertinere*".[3]

Pothier says: "A contract is a particular kind of agreement and an agreement is the consent of two or more persons to form some engagement, or to rescind or to modify, an engagement already made. *Duorum vel plurium in idem placitum consensus.*"[4] The essence of contract consists in consent; it follows therefore that a person must be capable of giving his consent and, consequently, must have the use of his reason in order to be able to contract.

In Austin's notes of his undelivered lectures he says that the consent of the parties is of the essence of a contract.[5] Sir Frederick Pollock[6] and Sir J. W. Salmond[7] are equally definite as to the importance of real consent. Holland says that an obligatory contract is the union of two or more parties in an accordant expression of will, with the object of creating an obligation between them.[8] The same writer says that a luna-

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[1] Story, *Equity Jurisprudence* (3rd Eng. ed. 1920) § 222.
[2] Pufendorf, *De Jure Naturae et Gentium* (1734) bk. 3, c. 6, S. 3, Barbeyrac's note 1.
[3] *De Jure Belli ac Pacis* (1646) lib. II, cap. XI, s. IV, 3.
[4] Pothier, *Obligations* (Evans' ed. 1806) 3.
[5] 2 *Jurisprudence* (3rd ed. 1869) 939 *et seq.*
[6] *Principles of Contract* (8th ed. 1911) 2-5.
[7] *Jurisprudence* (3rd ed. 1910) c. XVI.
[8] *Jurisprudence* (12th ed. 1916) 258.

tic can perform no juristic act because he has no capacity for willing: and that lunatics, though capable of holding property, are, strictly speaking, incapable of any legal act.[9] Grotius says in effect that no promise is binding unless the person who made it has liberty to choose for himself, and understanding to direct him in his choice. Without these faculties of liberty and understanding, he is no moral agent, or is not capable of doing an act so as to produce any moral effect by it. Upon this account the promises of infants, idiots and madmen are not binding: such persons are not moral agents and are therefore unable to do any valid act.[10] He adds that the use of reason is the first requisite to constitute the obligation, or *vinculum juris,* of a promise, which a lunatic, idiot, and an infant are consequently incapable of making: "*Primum requiritur usus rationis: ideo et furiosi et amentis et infantis nulla est promissio*"[11]

A typical example of the conflicting statements made by the text-writers is to be found in the fact that the learned author of Leake on *Contract*[12] says without qualification that a person may be mentally afflicted to such a degree as to be incapable of understanding an agreement, and, consequently, incapable of binding himself by contract. He refers as his authorities to *Ball* v. *Mannim,*[13] *Blachford* v. *Christian*[14] and to *Jenkins* v. *Morris.*[15] On the same page he quotes the decision in the *Imperial Loan Co.* v. *Stone*[15a] which is an important qualification of his first statement. (In *Ball* v. *Mannim,* the House of Lords approved the declaration of the judge in the Court below that both of the parties to a valid contract must be capable of understanding and acting in the ordinary affairs of life.)

Now a contract is a voluntary agreement which will be recognized and enforced by law and, in order to create an agreement, there must be consent of parties: such consent, may be either expressed or implied from conduct. In other words, there must be *duorum pluriumve in idem placitum consensus.* Moreover, the two essential elements in consent are that it must be free and that it must be intelligent. Consent cannot be given where one of the parties is without an intelligent mind; therefore, in strict legal theory, a lunatic cannot give consent; and, consequently, he cannot enter into a contract. This conclusion is precisely the deduction expressed by the maxims of the Roman Law cited below. That the jurists applied the deduction logically and consistently, is made clear by Sohm, who states: "by Roman law a lunatic cannot even buy a loaf for himself, though he have money to pay for it":[16] that is to say, no obligation would be created.

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[9] *Ibid.* pp. 110, 354, (at least in the Roman Law.)
[10] See *De Jure Belli ac Pacis* (1646) lib. II, cap. XI, s. V.
[11] *Ibid.* [12] (6th ed. 1912) 415.
[13] (1829) 3 Bli. (N. S.) 1.
[14] (1829) 1 Knapp. P. C. 73.
[15] (1880) L. R. 14 Ch. D. 674.
[15a] (1847) 16 M. & W. 877.
[16] *Institutes* (1841) s. 45.

In the case of a lunatic, however, it is manifest that it may happen that the intellectual faculties are so obscured and the judgment so disordered that the agreement which is the foundation of the contract cannot have taken place, and, there being no contract, there will be no primary obligation, and therefore no liability to a secondary one. In the *Institutes* of Justinian [17] it is declared that *"Furiosus nullum negotium gerere potest, quia non intelligit quod agit"*. Bracton and the author of Fleta use similar language in their works when dealing with this subject. Thus, for example, Bracton writes *"Furiosus autem stipulari non potest, nec aliquod negotium gerere, quia non intelligit quod agit"*. [18]

The law as stated by Bracton and by the author of Fleta was approved by the Court of Appeal as recently as in 1890 in the case of *Re Rhodes, Rhodes* v. *Rhodes,* [19] where it was stated that there cannot be a contract by a lunatic. While it is true that in this case the question for the decision of the Court was whether or not a lunatic could, in certain circumstances, be said to have entered into an *implied* contract, it is interesting to note that in the opinion of the learned judges of the Court of Appeal a lunatic was incompetent to make an express contract, much less an implied contract. The Court considered that to use the term *implied contract* in respect of a lunatic was unfortunate, and that it would be more consistent with the principles of jurisprudence to state that the circumstances which in the case of a normal person would give rise to an *implied contract,* would in the case of a lunatic give rise to an implied *obligation.*

In conformity with the above-mentioned principles, the positive laws of many countries have declared to be invalid the contracts and voluntary acts (*e. g.* conveyances) of idiots, lunatics and of other persons of unsound mind. In fact, speaking generally, the law of most civilized countries treats lunatics as wholly irresponsible for their actions. In such countries a lunatic is not chargeable at law for his acts. He cannot commit a crime or a tort, he cannot marry, or make a will, or bind himself by contract, or be a witness, or bring an action. *Quoad haec omnia* he is regarded as standing precisely on the same level as a child below the years of discretion. [20]

The following paragraphs showing the position in other legal systems of a lunatic so far as regards capacity in contract have been inserted by way of commentary on the old English doctrine of total incapacity, consideration of which follows in the next section.

The Roman Law was quite clear and consistent upon the matters

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[17] Book III, tit. 19, s. 8.
[18] Bk. 3, c. 2, s. 8.
[19] (1890) L. R. 44 Ch. D. 94.
[20] These statements do not apply to acts done by a lunatic during what is termed a "lucid interval" (*quo furor intermissus est*) for during a lucid interval—which is always a question of fact—there is no insanity at all; in fact, the person in question is sane for the time being.

referred to. It always treated the ordinary lunatic as being practically in the same position as the *infans pupillus.* The general maxims were *furor nulla voluntas est* [21] and *furiosus nullum negotium gerere potest, quia non intellegit quod agat.* [22] He had even less capacity than a pupil above *infantia,* because while the latter could with *auctoritas* of his tutor enter into any lawful contract and could, even without it, be bound by one which was of benefit to him, all contracts alleged to have been entered into personally by a *furiosus* were totally null and void. The uncertain duration of mental incapacity led the Romans to appoint a *curator,* and not a *tutor,* to be the guardian of the lunatic. The *curator* was intended to supply that which the lunatic lacked, *viz.,* civil capacity.

Similarly, under the law of Scotland, following the Roman Law, persons in a state of "furiosity" or of "idiocy" are declared to be incapable of, or not to be bound by, any legal act. Thus Lord Stair in his *Institutions* [23] says: "Neither infants, nor idiots, nor furious persons, except in their lucid intervals, can contract".

The German Code, which follows closely the Roman Law, places lunatics and infants exactly on the same footing. The relevant paragraphs are as follows: [23a]

§ 104. *Geschäftsunfähig ist:*

(1) *Wer nicht das siebente Lebensjahr vollendet hat;*

(2) *Wer sich in einem die freie Willensbestimmung ausschliessenden Zustande krankhafter Störung der Geistesthätigkeit befindet, sofern nicht der Zustand seiner Natur nach ein vorübergehender ist;*

(3) *Wer wegen Geisteskrankheit entmundigt ist.*

§ 105. *Die Willenserklärung eines Geschäftsunfähigen ist nichtig.*

The law of British India is contained in the Indian Contract Act, 1872, Sections 11 and 12 of which declare that contracts made by insane or intoxicated persons are void.

The following statement of American Law appears in a leading American work: [24]

"They who have no mind 'cannot agree in mind' with another; and, as this is the essence of a contract, they cannot enter into a contract. Mere mental weakness or inferiority of intellect will not incapacitate a person from making a valid contract . . . There must be such a condition of insanity or idiocy, as, from its character or intensity, disables him from understanding the nature and effect of his acts, and therefore disqualifies him from transacting business and managing his property: and an adult person, although of unsound mind, can become liable on an implied contract for necessaries."

If the condition of lunacy be established by proper evidence under proper process, the representatives and guardians of the lunatic may

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[21] Dig. L. 17, f. 40.

[22] Gaius, Com. 111, s. 106; Justinian I, iii, 19, s. 8; Dig. bk. 12, s. 1, sub-sec. 12.

[23] 1-10-13.

[23a] 1 Planck, *Bürgerliches Gesetzbuch* (1903).

[24] 1 Parson, *Contracts* (9th ed. 1904) 443.

avoid a contract entered into by him at a time when he is thus found to have been a lunatic, although he seemed to have his senses, and the party dealing with him did not know him to be of unsound mind. But this rule has one important qualification, quite analogous to that which prevails in the case of an infant, and resting undoubtedly on a similar regard for the interests of the lunatic. This is, that his contract cannot be avoided, if made *bona fide* on the part of the other party, and for the procurement of necessaries. This, as in the case of infants, would not be restricted to absolute necessaries, but would include such things as are useful to him and proper for his means and station in life.

The finding by a competent court of the fact of lunacy and the appointment of a guardian are held to be conclusive proof of such lunacy; all subsequent contracts are void.

While the American Law protects both infants and lunatics without regard to the other party's knowledge or want of knowledge of the infancy or of the insanity, it imposes a quasi contractual duty upon infants and lunatics to compensate for necessaries supplied to them.

By the Austrian Civil Code, whoever has not the use of his reason . . . is incapable of making or accepting a promise. (Art. 865). Whoever demands the annulment of a contract for the want of consent must return everything he has received to his advantage in consequence of such a contract. (Art 877).

By the Chilian Civil Code, persons of unsound mind are absolutely incapable of contracting. (Art. 1447).

According to French Law (*Code Napoléon*) among those persons declared to be incapable of contracting are those in respect of whom an order for interdiction has been made, *i. e.* persons of full age who are in an habitual state of imbecility, of insanity, or of madness,—even where subject to lucid intervals.

The Roman-Dutch Law, while denying the capacity of an insane person to bind himself by contract, recognizes the equity of allowing a person who has, in good faith, expended money on behalf of a lunatic, to have his expenses recouped. In *Molyneux* v. *Natal Land & Colonisation Co.*[25] it was held by the Judicial Committee of the Privy Council that a contract made by an insane person is void and not merely voidable, quite apart from the fact that the other party did or did not know of the existence of the insanity.

In the Middle Ages—in the days of the trade guilds—when English commerce was in its infancy, the acceptance of the plain doctrine of total incapacity, enunciated above, did not affect the convenience of traders; but when commerce began to develop upon broad lines, it was felt that a strict application of the doctrine would operate unfairly, inasmuch as it might lead to practices which, if unhindered, would prove inimical not only to the maintenance of justice, but also to the development of

[25] [1905] A. C. 555.

trading and of commerce. The objections to the old doctrine—which recognized no difference between one lunatic and another—were said to be obvious to the observer of human nature, and to fall under four heads, *viz.*, (1) the insecurity of enjoyment; (2) the encouragement of fraud; (3) the restraint of trade; and (4) the restraint upon alienation.

The old doctrine of total incapacity was first attacked by an application of the ancient rule of procedure that no man may stultify himself by pleading his own incapacity. It would appear, however, that the old rule was not assailed until the reign of Edward III, for Britton, (who wrote in the reign of Edward I) asserts that *dum fuit non compos mentis* was at that time a sufficient plea to avoid a man's own bond.[26] There is also a writ in the Register from which it is clear that it was possible for the alienor to recover lands aliened by him during his insanity.[27]

While it is true that the authority of the rule was questioned in the third year of the reign of Edward III, this attempt to modify it was apparently unsuccessful, for Fitzherbert several years later (circ. 1534) states that the writ of *dum fuit non compos mentis* lies for the man who has aliened his land in fee simple, fee tail, for life or for years while he was of unsound mind.[28] It is interesting to note, however, that in the reign of Elizabeth it was held upon two occasions at least—once in an action of debt due upon a bond[29] and once in an action against an innkeeper for the loss of his guest's goods,[30] that a man may not stultify himself by pleading his own incapacity and that Fitzherbert's statement was not law.

Sir Edward Coke quotes Littleton[31] and the Year Books[32] as his authorities for the statement that the law did not allow a man to stultify himself by pleading his own incapacity in order to avoid his acts on the ground of his being *non compos mentis.* In *Beverley's case*[33] the Court accepted Coke's statement of the law as correct, and, on this authority, refused to allow a man to avoid an act which he had performed during his insanity. In other words, the effect of the decision in *Beverley's case* was to make a lunatic absolutely liable for his alleged contracts. The fact that he was or was not so insane as not to be able to understand the nature of his act does not appear to have been considered by the Court, which merely applied the curious rule of procedure that a man could not stultify himself by pleading his own insanity.

In *Beverley's case* the Court seems to have been so convinced of the existence of reliable authority for its judgment, that a resolution was

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[26] F. 66.
[27] Fol. 228.
[28] *Natura Brevium* 202.
[29] *Stroud* v. *Marshall* (1595) Cro. Eliz. 398.
[30] *Cross* v. *Andrews* (1599) Cro. Eliz. 622.
[31] Co. Litt., lib. 2, cap. *Descents,* fol. 95.
[32] (1461) 39 Hen. VI, 42 b; (1331) 5 Edw. III, 70.
[33] (1603) 4 Co. Rep. 123b.

passed deciding also that there should not be any relief in equity. It may be observed, however, that the veto of the Common Law judges was disregarded by the Court of Chancery.

There appears to have been a tendency on the part of the Common Law judges of the first half of the Nineteenth Century to follow the rule approved in *Beverley's case* whenever it seemed equitable to do so; but, on the other hand, they did not hesitate to ignore the rule whenever a strict application of it would have been contrary to the principles of natural justice. [34]

How conflicting were the authorities as to the liability of lunatics for their acts is well illustrated by reference to the decision in *Thompson* v. *Leach* (1690) [35] where it was held that the deed of a lunatic was void on the ground that "lunatics, like infants, know not how to govern themselves", the Court having declared that "the cases of lunatics and infants go hand-in-hand and that it is incongruous to say that acts done by persons of no discretion shall be good and valid in the law". On the other hand, Lord St. Leonards stated in 1845 that, in his opinion, it was incontrovertibly established that the party himself could not, after he had recovered his senses, plead his lunacy in avoidance of the deed. [36]

According to the text-writers, however, a survey of the relevant decided cases reveals the fact that the universal authority of the doctrine that the contract of a lunatic is void has been gradually modified without being expressly overruled, [37] and that the rule that no man could stultify himself by pleading his own incapacity has been modified to such an extent that, in the year 1849, it was held in the case of *Molton* v. *Camroux* [38] and confirmed on appeal [39] that unsoundness of mind is a good defence to an action upon a contract, provided that due proof can be given that the defendant lacked capacity to contract and that the plaintiff either knew it or would have known it if he had exercised ordinary care and observation.

It should be observed also that before the decision in *Molton* v. *Camroux*, the rule in *Beverley's case* [40] had been subjected to hostile attacks by several eminent authorities. For instance, Fonblanque in his book on *Equity* states that to adhere to the rule that a man may not plead his own incapacity is in defiance of natural justice and of the universal practice of the civilized world. [41] Again, in the case of *Thompson* v. *Leach* [42] it was observed by Lord Holt that it was unaccountable that a man should not be able to excuse himself by the visitation of heaven,

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[34] *Yates* v. *Boen* (1739) 2 Str. 1104.
[35] (1689) 3 Mod. Rep. 301.
[36] 2 Sugden, *Powers* (1845) 179.
[37] Pope, *Lunacy*, bk. II, c. 1.
[38] (1848) 2 Exch. 487.
[39] (1849) 4 Exch. 17.
[40] (1603) 4 Co. Rep. 123b.
[41] *Treatise of Equity* (3rd ed. 1805) bk. 1, c. 2, s. 1.
[42] (1689) 3 Mod. Rep. 301.

when he might plead duress from man to void his own act; Sir W. Evans states that nothing could be more absurd than this maxim;[43] while Mr. Justice Story expresses his disagreement with it in the following terms: "how so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilized beings is a matter for wonder and humiliation".[44]

In America the doctrine has been repudiated as being contrary to reason and to justice; the American authorities sustain the principle that lunacy nullifies a contract and that insanity may either be specially pleaded or given in evidence under the general issue.[45]

Although the rule that a lunatic was bound by his contracts may have seemed contrary to justice, it has nevertheless, been defended by some English text-writers on the ground that the rule worked well in practice, as it protected *bona fide* purchasers and imported an element of certainty into the matter, which was considered to be of much utility.

The old rule having been disposed of, consideration will now be given to the modern rule.

THE MODERN RULE

The modern rule as to a lunatic's capacity to enter into contracts rests to a large extent but not entirely upon the case of *Molton* v. *Camroux*,[46] where an action was brought by the administrators of an intestate lunatic to recover the money paid by the deceased to an assurance society in respect of two annuities which were determinable with his life. It was proved that the intestate was of unsound mind at the date of the purchase, but that the transactions were fair and in the ordinary course of business, and that the insanity was not known to the society. The lower court held that the money could not be recovered. Upon subsequent appeal to the Exchequer Chamber the rule was laid down in the following terms:

". . . the modern cases show, that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position."[47]

Whether or not this rule is, in fact, supported by authority and by principle it is the object of this article to determine.

According to the decisions in several old cases, every person dealing with a lunatic with knowledge of his incapacity is deemed to perpetrate upon him a fraud which avoids the contract.[48] In the existence of this

[43] 2 Pothier, *Obligations* (Evans' ed. 1806) note, App. 3, p. 25.
[44] 1 Story, *Equity Jurisprudence* (14th ed. 1918) 309.
[45] *Mitchell* v. *Kingham* (Mass. 1827) 5 Pick. 431; *Grant* v. *Thompson* 4 Conn. 203, *etc., etc.*
[46] (1848) 2 Exch. 487. [47] (1849) 4 Exch. 17, 19.
[48] *Wright* v. *Proud* (1806) 13 Ves. Jr. 136; *Baxter* v. *Earl of Portsmouth* (1826) 5 B. & C. 170.

legal presumption probably lies an explanation of the insistence by the courts upon proof of the other party's knowledge of the alleged lunacy. Any doubt which may have existed relative to the present law as to the position of a person who, having recovered from his lunacy, seeks to avoid a contract entered into by him while he was of unsound mind is said to have been removed by the decision of the Court of Appeal in *The Imperial Loan Co.* v. *Stone.*[49] In this case a promissory note had been signed by a lunatic as surety, and the statement of defense to an action in which the lunatic was sued alleged that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and that the insanity of the defendant was known to the plaintiffs. In the court below, the jury were unable to agree as to whether or not the plaintiffs were cognizant of the lunacy of the defendant, and notwithstanding this, the judge ordered judgment to be entered for the defendant. The Court of Appeal, on the authority of *Molton* v. *Camroux*, ordered a new trial, holding that to succeed in the defense of insanity to an action in contract, it is necessary to show that at the time of the contract such insanity was known to the plaintiff.

In the judgments delivered in the Court of Appeal by Lord Esher, M. R., and by Fry, L. J., many old cases and authorities were reviewed, and it was stated that there had been grafted upon the old rule, (*viz.*, that a man could not stultify himself by pleading his own incapacity), the exception that the contracts of a person who is *non compos mentis* may be avoided when his condition can be shown to have been known to the plaintiff. The Master of the Rolls in his judgment declined to recognize that, in cases of this sort, there existed any difference in the law between executed and executory contracts, and stated that any suggestion that there is a difference was not supported by the authorities.

The principles of the law of contract have been set out above which must be applied in order to arrive at a satisfactory conclusion upon the question whether a lunatic possesses capacity to enter into a contract. Let us now proceed to examine the authorities (*i. e.* decided cases) upon which the decision in *The Imperial Loan Co.* v. *Stone* is said to rest. The Court of Appeal in dealing with *The Imperial Loan Co.* v. *Stone* relied entirely upon *Molton* v. *Camroux* where the authorities relied upon were three cases, *viz.*, *Dane* v. *Viscountess Kirkwall,*[50] *Baxter* v. *Earl of Portsmouth,*[51] and *Browne* v. *Joddrell.*[52] Upon reference to the facts of these cases, it is evident that both *Baxter* v. *Earl of Portsmouth* and *Dane* v. *Viscountess Kirkwall* were contracts for necessaries, and that the decision in *Browne* v. *Joddrell* was based upon *Baxter* v. *Earl of Portsmouth.*

It would appear therefore that the cases of *Molton* v. *Camroux* and of *The Imperial Loan Co.* v. *Stone* were wrongly decided, inasmuch as the facts of these cases differ fundamentally from those of the cases upon

[49] [1892] 1 Q. B. 599.
[50] (1838) 8 C. & P. 679.
[51] (1826) 5 B. & C. 170.
[52] (1827) 1 Mod. & Mal. 105.

which the court relied as authority for its decision. The facts of the cases referred to are as follows:

Dane v. *Viscountess Kirkwall.* In this case it was held that in order to constitute a defense to an action for use and occupation of a house (*i. e.* a necessary) taken by the defendant under a written agreement at a stipulated sum per annum, it is not enough to show that the defendant was a lunatic, and that the house was unnecessary for her, but it must be shown also that the plaintiff knew this and took advantage of the defendant's situation; and, if that be shown, the jury should find for the defendant; and they cannot, on these facts, find a verdict for the plaintiff for any sum smaller than that specified in the agreement. Patteson, J., says,[53] "It is not sufficient that it be shown that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it." The rent was exorbitant, and evidence was given of the knowledge of the plaintiff that the defendant was insane. Verdict was given for the defendant.

Baxter v. *Earl of Portsmouth.* In this case a tradesman supplied a person with goods suited to his station in life; and afterwards, by an inquisition taken under a commission of lunacy that person was found to have been lunatic before and at the time when the goods were ordered and supplied. It was held that this was not a sufficient defense to an action for the price of the goods, since the tradesman at the time when he received the orders and supplied the articles did not have any reason to suppose that the defendant was a lunatic.

Browne v. *Joddrell.* This was an action on a contract for necessary work and labour and for goods sold and delivered. It was held by the Court of King's Bench that it is no defense that the defendant is of unsound mind unless the plaintiff knew of, or in some way took advantage of, his incapacity, in order to impose upon him. Lord Tenterden, in delivering judgment in this case, relied entirely upon *Baxter* v. *Earl of Portsmouth,* a case of necessaries. No other authority was cited.

Pollock, B., in *Molton* v. *Camroux* says that the court in *Baxter* v. *Earl of Portsmouth* laid down the same rule as in *Browne* v. *Joddrell,* and that the explanation for the court's doing this would seem to lie in the fact that both were cases of necessaries.[54]

Other relevant cases which appear to have been ignored by the court in *Molton* v. *Camroux* but were referred to by counsel for the defense were as follows:

Williams v. *Wentworth.*[55] This was a case where necessaries having been supplied to a lunatic, the court held that the law will in such cases raise an "implied contract" against the lunatic or his estate. It appears from the judgment of the Master of the Rolls that the "implied contract" raised by the law is so raised because a lunatic is incapable

[53] (1838) 8 C. & P. 679, 685. [54] (1848) 2 Exch. 502. [55] (1842) 5 Beav. 325.

of contracting. The following words of the Master of the Rolls show that the law supplies the capacity to contract which the lunatic lacks: "A debt is constituted by reason of a contract, which, in such cases, the law will supply . . ." [56]

Howard v. *Earl of Digby.* [57] In this case the House of Lords held that a lunatic cannot bind himself by bond or by will; a lunatic cannot release a debt by specialty; neither can he be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security. A clear distinction was drawn by the Lord Chancellor between cases of necessaries and other cases.

In *The Imperial Loan Co.* v. *Stone* two cases were referred to where the courts were required to determine whether the contract of a drunken person was void or voidable. It was held in *Matthews* v. *Baxter* [58] that the contract of a drunken person is voidable only, *i. e.,* that it is capable of ratification by the drunken person when he recovers his senses. Inasmuch as in the opinion of Sir Frederick Pollock, drunken men are, so far as regards their capacity to enter into valid contracts, on the same footing as lunatics, [59] it is interesting to observe that in *Matthews* v. *Baxter* the Court of Exchequer followed the decision in *Molton* v. *Camroux.* Now, as stated above, it was held in this case that the contract of a man too drunk to know what he is about is *voidable only,* and *not void,* and that such contract is therefore capable of ratification by him when he becomes sober. It was argued that the court was bound by *Gore* v. *Gibson,* [60] where a drunken man's contract was declared by the Exchequer to be "void altogether," but the court declined to be bound by *Gore* v. *Gibson,* and held that the decision in *Molton* v. *Camroux* constituted authority for the declaration that the contract of a drunken man who, at the time of the contract, was incapable of understanding what he was doing was voidable only and (presumably) only so if the other party knew of the drunken man's condition.

In delivering judgment in *Matthews* v. *Baxter,* Pollock, C. B., said that the doctrine referred to appears to be in accordance with reason and justice. He stated also that in cases of necessaries supplied for the use of a person who is incapable of contracting, the law itself will make a contract for the parties. The judgment of Parke, B., (which is similar to that of Pollock, C. B.), is expressed in the following words:

"Where the party when he enters into the contract is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether and he cannot be compelled to perform it. A person who takes an obligation from another in such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine that a man

[56] *Ibid.* 329. [57] (1834) 2 Cl. & Fin. 634.
[58] (1873) L. R. 8 Ex. 132.
[59] *Principles of Contract* (8th ed. 1911) 54, 95.
[60] (1845) 13 M. & W. 623.

shall not be allowed to allege his own lunacy or intoxication, and total drunkenness is now held to be a defense; *Yates* v. *Boen*[61], *Cole* v. *Robbins*."[62]

In the judgment of Alderson, B., (which completed the unanimity of the court) is expressed the opinion of that eminent judge that the party's act in making the indorsement upon the bill was just the same as if the party had written his name upon the bill in his sleep, in a state of somnambulism. Bramwell, L. J., was of the same opinion as Baron Alderson, for in *Drew* v. *Nunn*[63] he said: "If a man become so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting."

It should be pointed out that in *The Imperial Loan Co.* v. *Stone* the court ignored altogether the principle laid down in *In re Rhodes, Rhodes* v. *Rhodes*,[64] *viz.*, that *even for necessaries* the liability of a lunatic was based *not upon contract at all,* but upon an obligation imposed by law analogous to those obligations which are raised in cases where infants have been sued for the cost of necessaries supplied to them.

It is notable that in *The Imperial Loan Co.* v. *Stone* the important case of *In re Rhodes* was not considered and followed. A careful perusal of the report of this case shows that the judge in the court below and the judges in the Court of Appeal entertained no doubt that a lunatic could not enter into a contract because his consent would be a nullity.[65] The words of Lord Langdale, M. R., in *Williams* v. *Wentworth*[66] were quoted with approval. The Master of the Rolls said that in the case of necessaries the law supplies that which the lunatic lacks and that this rule rests upon a far better foundation than the rule that a man shall not be allowed to stultify himself. In the same case the following words of Mellish, L. J., in *Re Gibson*[67] were referred to with approval: "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by *implied* contract."

In the judgment of Cotton, L. J., in *In re Rhodes, Rhodes* v. *Rhodes*[68] no doubt is left that it was the opinion of the court that a lunatic could not himself contract in express terms. No qualification was made as to the other party's knowledge of the lunacy. Similarly, Lindley, L. J., said:

". . . in *In re Weaver*[69] a doubt was expressed whether there is any obligation on the part of the lunatic to pay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the un-

[61] (1738) 2 Str. 1104.
[62] Buller, *Law of Nisi Prius* (1781) 172.
[63] (1879) L. R. 4 Q. B. D. 661, 669.
[64] (1890) L. R. 44 Ch. D. 94.
[65] Per Kay, J., *Ibid.* at p. 98.
[66] (1842) 5 Beav. 327.
[67] (1871) L. R. 7 Ch. 52.
[68] (1890) L. R. 44 Ch. D. 105.
[69] (1882) L. R. 21 Ch. D. 615.

fortunate terminology of our law, owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu.*" [70]

It appears to have been assumed that the rule that a lunatic cannot enter into a contract admitted of an exception in the case of necessaries: whereas, in fact, the law does not admit of an exception, but, in recognition of the fact that a lunatic himself cannot enter into a contract, it will raise a quasi contract or obligation for him, on one of two assumptions, *viz.*, (1) that, if the lunatic were in possession of his senses, he would be willing to pay the cost of necessaries supplied for his use; (2) that inasmuch as only necessaries have been supplied to the lunatic, it is equitable that he or his estate should bear the cost thereof.

The *ratio decidendi* in the cases cited above appears to have been based on the mere fact that a lunatic is incapable of coming to that *consensus ad idem* without which no contract can be formed. If this be the law as to *necessaries,* it applies with even greater force to contracts alleged to have been entered into by a lunatic for purposes other than the supply of necessaries. In other words, inasmuch as the law deems a lunatic incapable of contracting *even for necessaries,* and accordingly, raises an obligation for him, it would seem to follow, *a fortiori,* that in the case of goods or services which are not necessaries, a lunatic is incapable of binding himself by contract.

Further, it will be observed also that in none of the above-mentioned systems of foreign law is it necessary that the person dealing with the lunatic must be aware of the insanity in order to render the contract void. In the Common Law of England, however, by the decision in *The Imperial Loan Co.* v. *Stone,* an exception to this universal doctrine of incapacity seems to have been established, inasmuch as insane persons are declared to be bound by their contracts, unless the other parties to such contracts knew or had reason to believe that the lunacy existed.

It is remarkable that in the judgment of the court in *The Imperial Loan Co.* v. *Stone* no reference is made to the character or degree of the insanity, and that both in *Molton* v. *Camroux* and in *The Imperial Loan Co.* v. *Stone* not only was the question of incapacity ignored by the court, but no regard was had to the analogy as to capacity and consent which exists between contracts of marriage—into which a lunatic may *not* enter —and ordinary contracts.

In the three judgments delivered in the Court of Appeal in *The Imperial Loan Co.* v. *Stone* the above-mentioned fundamental conceptions of the Common Law were not challenged: they appear rather to have been ignored. The effect of the decision is to impose liability upon

[70] (1890) L. R. 44 Ch. D. 107.

a lunatic for his alleged contracts upon grounds presumably either of equity, or of expediency, or of convenience of trade. Let us consider these grounds. It is obvious that where A enters into a contract with B who, as far as A knows, is quite capable of managing his own affairs, he might suffer damage if the contract were nullified subsequently owing to the fact that B was insane at the time of the transaction. For example, where a tobacconist receives an order for a consignment of cigars, and in good faith executes it, it is hard on him to receive intimation that the person who gave him the order was *non compos mentis* and that, consequently, he cannot recover the price of the cigars. There is no doubt that he would be entitled to get back such of the cigars as have not been consumed and, so far as the estate of the lunatic has benefited, he would be entitled on general principles of equity, to recompense. In any event, there is hardship, inasmuch as he suffers loss by losing his profit.

Consideration of the following case, however, will show that the hardship is not confined to the tradesman. A lunatic who has insane delusions which are accompanied by animosity against his relatives (*quod frequenter accidit*) despatches to a dealer all his family plate and valuable ornaments, with a letter instructing the dealer to dispose of them immediately for what they will fetch because the owner is in urgent need of money. The dealer, in good faith, sells the goods. In this way rare curios or articles of great sentimental value to the family are disposed of at a price greatly below their intrinsic worth. It would certainly be very hard for the lunatic (upon recovery), or for his family, if the goods could not be recovered upon payment of the price at which they were sold.

Similarly, where A, who has suddenly become insane, meets an unscrupulous acquaintance, B, who induces him to become surety to a bill for an amount sufficient to exhaust the whole of A's fortune: the bill is discounted (A's credit being good) and B either absconds with the proceeds or squanders them and becomes bankrupt. The discounters acted in good faith and had no knowledge of A's insanity. It would seem to be repugnant to the principles of equity that the lunatic should be compelled to meet the bill, (the nature of which he could not *ex hypothesi* have understood) and consequently be ruined. The foregoing illustration represents the effect of the decision in *The Imperial Loan Co.* v. *Stone*. In the hypothetical case referred to there is a conflict of equity, inasmuch as it would doubtless be hard on the discounters of the bill if they suffered the loss when acting in good faith, (as is the case where the signature to a bill is discovered to be a forgery), or where, as in *Lewis* v. *Clay*[71] the signature was obtained by deceit as regards the document signed. It should be borne in mind, however, that bill discounters are able to make all proper enquiries and to take steps to protect

[71](1897) 67 L. J. Q. B. 224.

themselves. Further, if of two innocent parties, it is requisite that one should suffer, it is equitable that the courts should decide in favour of him who is least capable of protecting his own interests.

The inadequacy of the decision in *The Imperial Loan Co.* v. *Stone* as a rule of the law of contract is further demonstrated by a consideration of the circumstances depending upon contracts entered into by parties who have not seen each other. Much business is transacted to-day by means of contracts entered into through the medium of the Post Office, by parties who might have had no opportunity of meeting personally before the completion of the contract. A lunatic, although deeply deluded, may be (as many of them are) capable of writing a rational business letter accepting an offer made by an advertiser to supply certain goods. The lunatic orders a large quantity of goods without any regard to his need or to his means. It would seem to be inequitable for the lunatic, upon his recovery, or for his friends, to be precluded from recovering the money paid upon restoring the goods. In this connection it must be remembered that the rule laid down in *The Imperial Loan Co.* v. *Stone* is absolute, *i. e.*, no distinction is made in cases where *restitutio in integrum* is possible, although in *Molton* v. *Camroux* (which was the authority for *The Imperial Loan Co.* v. *Stone*) the need for such a distinction was not overlooked by the court.

Again, in the law relating to the capacity of lunatics to marry the English Law does not follow out to its logical conclusion the rule in *The Imperial Loan Co.* v. *Stone* inasmuch as while it is true that marriage is something more than a contract since it results in an alteration of status, the contractual element is the predominant feature of marriage. In *Turner* v. *Meyers* [72] Sir Wm. Scott said: "It has been considered in its proper light as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons." In *Hancock* v. *Peaty* [73] it was held that marriage with a lunatic is null even though the other contracting party was ignorant of the fact. In that case a man married a woman who was found to be insane at the date of the marriage, and the marriage was afterwards set aside at the instance of the woman's guardians, although the husband established to the satisfaction of the Court that he was in ignorance of the existence of the insanity when the ceremony was performed. The argument turned upon the mere incapacity, through insanity, of the woman to contract, and the judgment rests upon clear and intelligible principle.

Now, if it be contented that the modern rule rests not upon principle but upon the unfairness which would be suffered by parties who, having *bona fide* entered into contractual relations with a lunatic, have their contracts upset for want of capacity on his part, it is difficult to understand why the Common Law should apply an entirely different doctrine

[72] (1808) 1 Hagg. Cons. 414, 417.

[73] (1867) L. R. 1 P. & D. 335.

to infants. No judge or text-writer has yet attempted to explain why an infant, whose intelligence is limited, is treated more favourably by the law than a lunatic, who has no intelligence at all. If a tradesman enter into a contract with a young man age 20 years who appears to the tradesman to be over 21 years of age, the former will have to bear the loss suffered as a result of his mistake, unless the goods sold were necessaries. The infant may even have been guilty of deliberate deception, but this fact does not make the contract valid. The tradesman acts at his peril. Inasmuch as the policy of the law of England is to protect infants, on the ground of their immaturity of reason, much more is it to be expected that the law would protect lunatics who have no reason at all, especially when it is recollected that in no other legal system is the principle of protecting infants carried to such an extreme extent as is done in English Law.

The Roman Law allowed minors (*i. e.* persons between fourteen and twenty-five years) to make contracts without the *auctoritas* of *curatores,* subject only to two qualifications, *viz.,* (1) that such contracts could be challenged within a certain time, (2) that *restitutio in integrum* would be allowed if the contracts were proved to be detrimental to the minors.

The Law of Scotland is almost identical with that of the Roman Law except that the age of majority is fixed at 21 years. The Scots' Law allows a period of four years after the attainment of majority during which contracts entered into and deeds executed by infants may be set aside if such acts be proved to have been against the infant's interests.

It would seem that in neither *Molton* v. *Camroux* nor in *The Imperial Loan Co.* v. *Stone* did the Court consider the analogy hitherto recognized in the English Law as existing between the law relating to lunatics and that relating to infants. In both cases the opinion of the Court in *Thompson* v. *Leach* [74] where it was stated that "the cases of lunatics and infants go hand-in-hand because the same reasons govern both" was ignored. The following words of the judgment in *Thompson* v. *Leach* would seem to show that the principle referred to was fully apprehended by the Court:

"it is incongruous to say, that acts done by persons of no discretion shall be good and valid in the law; such are infants and lunatics, and it stands with great reason that what they do should be void, especially when it goes to the destruction of their estates."

As the law stands at present, therefore, infants incapacitated from contracting, except for necessaries, (Infants' Relief Act, 1874,) are not estopped from pleading their infancy, whereas by the decision in *The Imperial Loan Co.* v. *Stone* lunatics are estopped from pleading *non compos mentis* unless the other party knew of the insanity.

[74] (1689) 3 Mod. Rep. 301.

In view of the conclusions stated above relative to the decision in *The Imperial Loan Co.* v. *Stone* it is of much significance that the Judicial Committee of the Privy Council have, upon at least two occasions since the hearing of the case referred to, refused to follow that decision.

The first case was decided in 1904, when an appeal was heard from a judgment of the High Court of Australia in which it had been held in a suit for the rectification of a share register that a power of attorney executed by the plaintiff when he was a lunatic and did not understand what he was doing was void, and that the transfer of the plaintiff's shares effected by the defendant company under such power of attorney was a nullity, *although the company had no notice of the insanity.* In stating their Lordships' reasons for refusing leave to appeal, Lord Macnaghten said: " . . . their Lordships, having had the advantage of hearing argument on both sides, see no reason to doubt that the judgment of the High Court is right." [75] The decision in *Thompson* v. *Leach* was referred to with approval and so also was that in *Elliot* v. *Ince.* [75a] His Lordship proceeded as follows: "The risk to a company acting on a power of attorney is no doubt considerable, but the directors can protect themselves to some extent by making careful enquiries—a precaution apparently not taken in the present case". It is significant that Lord Macnaghten referred to the power of attorney as "mere wastepaper" owing to the state of mind of the person executing it, and he said "it is difficult to see how anything which rests on it as the foundation and groundwork of the whole superstructure can be of any validity, whether the transaction is beneficial to the lunatic or not". From the words of the judgment quoted, it would seem that the Judicial Committee appreciated the fact that the company had no notice of the insanity.

The second case which was argued before the Judicial Committee was that of *Molyneux* v. *Natal Land and Colonization Co.* [76] where it was held that a contract made by an insane person is absolutely void, and not merely voidable, *in spite of the fact that the other party did not know of the existence of the insanity.* While it is true that this case was determined by reference to Roman-Dutch Law, the following words from the judgment of the Judicial Committee are important, inasmuch as they indicate the attitude of the Committee to the decision in *The Imperial Loan Co.* v. *Stone*:

"Even if the law of England had been applicable to the present case, their Lordships are unable to agree with the majority of the Natal Court that the bond sued upon would have been enforceable."

The decision in *Daily Telegraph Newspaper Co.* v. *McLaughlin* [77] was referred to with approval. These decisions would seem to indicate that

[75] *Daily Telegraph Newspaper Co.* v. *McLaughlin* [1904] A. C. 776, 779.
[75a] (1857) 7 D. M. & G. 475.
[76] [1905] A. C. 555.
[77] [1904] A. C. 776.

the House of Lords would hesitate to uphold the decision in *The Imperial Loan Co.* v. *Stone.*

It is significant that in two modern statutes, *viz.,* The Indian Contract Act, 1872, and the Sale of Goods Act, 1893, the legislature has laid it down in unmistakable language that a lunatic is incompetent, by reason of his mental incapacity, to enter into contracts. [78]

In conclusion, it is submitted that, from the foregoing consideration of the relevant facts and principles, the decision in *The Imperial Loan Co.* v. *Stone* as to the contractual liability of lunatics is inconsistent both with the Common Law of England and with the principles of Equity. In the light of the facts revealed by the research indicated in the preceding pages, it would appear that the present law of England as to contracts alleged to have been entered into by lunatics during insanity should be declared to be as follows:

The alleged contract is void, but, with the object of preventing the lunatic from benefiting from his acts, the lunatic or his estate shall be required to make restitution to the other party where (1) the lunatic has derived benefit as a result of his act, and (2) where the other party has suffered loss as a result of the act of the lunatic. This conclusion would appear to be consistent, both with the principles of the Common Law and with the rule of Equity that no one is to be enriched at the expense of another—*nemo cum detrimento alterius locupeltari potest*

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[78] Act of 1872, ss. 11 & 12; (1894) St. 56 & 57 Vict. c. 71, s. 2; *Mohori Bibee* v. *Dharmodas Ghose* (1903) 19 T. L. R. 295.